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April 22, 1998

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APR 23 1998

FCC MAIL ROOM

Magalie R. Salas, Secretary
Federal Communications Commission
1919 M Street NW, Room 222
Washington, D.C. 20554


RE: CC Docket Nos. ~~95-20~~ and ~~98-10~~, FCC 98-8, In the Matter of *Computer III* Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, and 1998 Biennial Regulatory Review -- Review of *Computer III* and ONA Safeguards and Requirements, Further Notice of Proposed Rulemaking, Reply Comments of the Washington Utilities and Transportation Commission.

Dear Ms. Salas:

Pursuant to the Federal Communications Commission's Further Notice of Proposed Rulemaking FCC 98-8, in the above referenced proceeding, enclosed for filing are an original and eleven copies of the Reply Comments of the Washington Utilities and Transportation Commission. We are also filing copies pursuant to the Notice with Janice Myles in the Common Carrier Bureau, and with International Transcription Services, Inc.

Please contact Tom Wilson at (360)-664-1293, tomw@wutc.wa.gov, if you have any questions about this filing.

Sincerely,


GREGORY J. TRAUTMAN
Assistant Attorney General

GJT:kl
Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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FCC Docket Room

In the Matter of)

Computer III Further Remand Proceedings:)
Bell Operating Company)
Provision of Enhanced Services)

CC Docket No. 95-20

1998 Biennial Regulatory Review --)
Review of *Computer III* and ONA)
Safeguards and Requirements)

CC Docket No. 98-10

Reply Comments of the Washington Utilities & Transportation Commission

The Washington Utilities and Transportation Commission ("WUTC") hereby files reply comments concerning the Further Notice of Proposed Rulemaking ("Further Notice") issued by the Federal Communications Commission ("Commission") in the above-captioned proceeding on January 30, 1998. We did not file initial comments in response to the Further Notice. However, our review of the initial comments filed by other parties leads us to offer our views on the specific issue of whether the Commission should restrict LECs from engaging in marketing practices that would have the anti-competitive effect of allowing LECs to leverage their monopoly power over bottleneck basic services into greater market share in the market for enhanced services.

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**I. SUMMARY: THE COMMISSION SHOULD RESTRICT LECS FROM
CROSS-SELLING BASIC AND ENHANCED SERVICES.**

In summary, the WUTC urges the Commission to restore the prohibition on joint marketing of basic and enhanced services, particularly when the enhanced service is Internet access. The WUTC believes that the conditions that led the Commission to permit such joint marketing no longer prevail and that the public interest in promoting competition and protecting consumers now would be best served by requiring fair competition in enhanced service markets. At a minimum, should the Commission choose not to restrict anti-competitive practices by LECs, it should make clear that state commissions such as the WUTC are not preempted from such oversight.

**II. THE EXPERIENCE WITH VOICE MESSAGING DEMONSTRATES THE
POTENTIAL FOR A TELECOMMUNICATIONS COMPANY TO
CAPTURE A DOWNSTREAM OR ENHANCED SERVICE MARKET IF
ANTI-COMPETITIVE MARKETING PRACTICES ARE NOT
RESTRICTED.**

The current Commission policy of permitting cross-selling and other anti-competitive marketing practices resulted from a desire to promote the introduction of advanced services for

the benefit of consumers. Voice messaging was seen as a particularly good example of a service that was not being deployed to the Commission's satisfaction, and the Commission was persuaded that LECs would be more likely to deploy the service if they were permitted to market the service to their captive customer base. The rationale was, in essence, better a monopoly than no service.

The outcome of that policy decision to permit anti-competitive practices is both a very widespread deployment of the voice messaging service by LECs and a virtual lock on that market by those LECs. Voice messaging has become so closely associated with local exchange telephone service that consumers typically neither appreciate that it is available from other providers nor understand why it is not regulated like the other services they purchase from their LEC. Consumers suffer from this monopolization, because competitors who might enter the market and drive prices lower are stymied by the advantage of LECs in selling the service to their captive customer base. Voice messaging has become yet another overpriced vertical feature, albeit an unregulated one. One may debate whether the alternative would in fact have been no voice messaging service at all, but clearly the ideal outcome of a robust competitive market where consumers have a choice of providers has not been realized.

**III. THE RATIONALE THAT SUPPORTED THE FCC'S INITIAL DECISION
TO ALLOW UNRESTRICTED, ANTI-COMPETITIVE JOINT
MARKETING IS NO LONGER VALID, PARTICULARLY WHEN THE
ENHANCED SERVICE IN QUESTION IS INTERNET ACCESS.**

Regardless of whether the Commission's original approach was the right one at the time, it is apparent that the original rationale for unrestricted, anti-competitive joint marketing is no longer valid. Voice messaging is now widely deployed. Given this widespread deployment, the Commission's focus should now shift to promoting greater competition and consumer choice in that market. LECs will likely be able to maintain their very large market share -- and the high profit margins that result from the lack of real competition -- as long as they are allowed to tie voice messaging into their bottleneck telecommunications services.

The most important concern with allowing LECs to continue their anti-competitive practices is not, however, that they would maintain their hold on voice messaging but that they would use these practices to obtain an unwarranted market share in the Internet access market. It should be noted that the LEC industry did virtually nothing to develop the market for Internet access service. The Commission gave LECs the same free rein to monopolize the Internet access market through anti-competitive practices, but the LEC industry did not develop that market. Instead, independent Internet service providers entered the business and met the demand of consumers for this service.

At this point, Internet access is a robust business that is experiencing rapid growth in demand and capacity. Indeed, LECs complain about the additional (revenue-producing) lines they are asked to provision on behalf of ISPs and their customers. Now, finally, LECs are entering the ISP market after it is well-established with few advantages of incumbency or consumer association of phone service with Internet service.

In such a robust and growing market, the "infant industry" protections adopted by the Commission with voice messaging in mind are inappropriate for Internet access service. If LECs are allowed to engage in anti-competitive behavior, such as joint marketing, the result will likely not be a greater deployment of the service but rather a shift of market share from independent ISPs to the LECs' ISP operations.

Consumers will be harmed if LECs are permitted to use anti-competitive marketing practices to gain market share in Internet access service and other enhanced services. If LECs are restricted from anti-competitive marketing practices, they will be forced to earn their market share the old-fashioned way, by offering customers better prices or better service. If LECs are allowed to engage in anti-competitive marketing practices, they can use those marketing practices to gain market share, without having to offer better prices and better service.

**IV. IF THE FCC CHOOSES NOT TO RESTRICT ANTI-COMPETITIVE
MARKETING PRACTICES, IT SHOULD NONETHELESS REFRAIN
FROM PRE-EMPTING STATES THAT MAY WISH TO RESTRICT
SUCH PRACTICES.**

The FNPRM invited comment on the issue of anti-competitive marketing practices but did not reach any tentative conclusions. Should the Commission choose not to restrict marketing practices at the federal level, the WUTC urges it to preserve the ability of states to engage in such oversight.

The Commission's current *Computer III* rules wisely engage in very minimal preemption of states. The Commission preempted only state regulations that would have the effect of requiring structural separations or would conflict with its network disclosure or privacy rules. States have not been preempted from overseeing and, if necessary, restricting anti-competitive practices relating to the provision of telecommunications service.

States have a very strong interest in promoting the development of competition for both basic and enhanced services. Under Washington state law, the WUTC is charged with ensuring that telecommunications services are provided without undue preference or advantage. Such undue preference or advantage could result if a LEC used marketing practices, including the marketing that occurs when a customer calls to place an order for basic telecommunications services, to advantage its own enhanced services over those of its competitors.

The WUTC considered adopting rules in 1997 addressing competitive practices.

These rules would have restricted LECs from using their natural advantage arising from the provision of bottleneck services to leverage themselves into competitive markets, such as long distance and enhanced services. The industry argued that rules were unnecessary because it would police itself. Based on this argument and the absence of any demonstrated abuses by the industry, the WUTC chose to defer consideration of any rules governing competitive practices.

The issue of competitive practices is before the WUTC once again with US West's filing of a tariff to provide high-speed digital subscriber line (DSL) service (WUTC Docket No. UT-980416). In March 1998, US West filed a tariff with the WUTC to provide DSL service, which is a telecommunications service that can be used to obtain high-speed access to the Internet or private networks. US West also has a very small ISP operation that has offered mass market service for only about three months. The primary issue in the WUTC's review of this tariff filing has not been the DSL service itself or the rates to be charged but instead the concern that US West will favor its own ISP over independent ISPs in the provision or marketing of DSL service. US West argued that the Commission's rules grant it broad authority to engage in cross-selling of Internet service to potential DSL customers, including the customers of other ISPs who call US West to place orders for DSL service -- despite the Commission's prohibition on use of CPNI for "unhooking" competitors' customers. The company nonetheless agreed to limitations on its marketing to reduce if not eliminate the disadvantage to other ISPs who might also use US West DSL service to provide high-speed Internet access.

The WUTC places a high priority on promoting competition, and competition can thrive only if competitors are held to reasonable standards in their practices. Firms with monopoly power should not be allowed to use unfair practices to maintain that monopoly, and they most certainly should not be allowed to use unfair practices to extend that monopoly into another market. The WUTC expects to engage in continuing oversight of the marketing practices of US West and other LECs, particularly where these companies are bottleneck providers of a telecommunications service and the companies are competitors in a downstream market, such as long distance or enhanced services. Through both enforcement actions and rules, the WUTC will ensure that providers of bottleneck services do not leverage their monopoly power into downstream markets and thereby harm consumers and competitors.

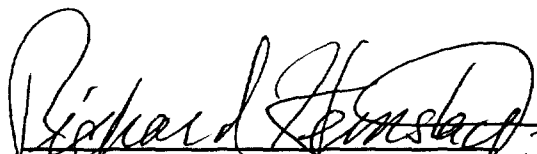
V. CONCLUSION.

The market conditions today for Internet access service are not at all like those for voice messaging at the time the Commission decided to permit anti-competitive marketing practices. There is much that LECs can do to improve access to the Internet, particularly by deploying telecommunications services with greater bandwidth over greater geographic areas. They do not need the unfair advantage currently available to them through anti-competitive marketing practices. The Commission should restrict anti-competitive practices or, at a minimum, maintain the ability of states to conduct such oversight without federal preemption.


DATED this 22nd day of April, 1998, at Olympia, Washington.


ANNE LEVINSON, Chair

Washington Utilities and Transportation
Commission


RICHARD HEMSTAD, Commissioner

Washington Utilities and Transportation
Commission


WILLIAM R. GILLIS, Commissioner

Washington Utilities and Transportation
Commission

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